Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1994

AIRBUS INDUSTRIE, ET AL.,
Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED FOR REVIEW

I. Whether the prohibition contained in 28 U.S.C. § 1447(d) against review of a case that has been remanded to state court applies when the order of remand involves a separable ruling denying a party's claim of immunity from suit under the Foreign Sovereign Immunities Act?

PARTIES

Petitioners are Airbus Industrie, G.I.E. and Aeroformation, G.I.E.[1/] Petitioners are defendants in the underlying litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the appellants and petitioners in the Fifth Circuit appeal and mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are Laura Howell Linton, individually and as the personal representative of the Estates of Andrew Jay Howell and Sarah Stoll Howell, Deceased, and on behalf of Rena Howell, Margaret F. Howell, Nell Jones and any other proper legal beneficiaries of Andrew Jay Howell and Sarah Stoll Howell; Rena Howell, individually, Margaret F. Howell, individually, and Nell Jones, individually; Ratna

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[1/]Petitioner Airbus Industrie is owned by a consortium of British Aerospace PLC; Deutsche Airbus GmbH; Construcciones Aeronautics S.A., and Aerospatiale.

The non-wholly owned subsidiaries of Petitioner Airbus Industrie are: Airbus Industrie of North America Holdings, Inc.; Airbus Industrie of North America, Inc.; Airbus Service Co.; Airbus Industrie Leasing Corp.; Airbus Industrie Leasing II, Inc.; Airbus Industrie Leasing IV, Inc.; Airbus Industrie Leasing V, Inc.; Airbus A300 Leasing, Inc.; Airbus Industrie Leasing VI, Inc.; 128829 Canada, Inc.; Societé Commerciale A300 S.A.; AVSA C.A.R.L.; Airbus Industrie (Bermuda) Ltd.; A300 Finance Ltd.; Widebody Finance I Ltd.; Widebody Finance II Ltd.; Airbus Spares Ltd.; AI Participations S.A.R.L.; Airbus Industrie (Netherlands) B.V.; AIFS Holdings B.V.; Tanja B.V.; Airbus Industrie Ireland Co.; AIFS Holdings Ltd.; Airbus Industrie Financial Services (Ireland); AIFS Company Ltd.; Airbus Industrie Finance B.V.; AIFS Leasing I; AIFS Leasing II.

Aeroformation has been dissolved and therefore has no parent companies or non-wholly owned subsidiaries.

Patel (Vaghjiani) and Valbai Patel (Vaghjiani), individually and as executors and personal representatives of the Estates of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani, Deceased, and on behalf of and as the next friends of Tulsi Vaghjiani and on behalf of Lalji Karsan Vekaria and Kanbai Lalji Vekaria and any other proper legal beneficiaries of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani) as the next friends of Tulsi Vaghjiani, individually, Lalji Karsan Vekaria, individually, and as the executors and personal representatives of the Estate of Rakhee J. Patel, Deceased, and on behalf of and as the next Friends of Deena J. Patel and any other proper legal beneficiaries of Rakhee J. Patel; Neeta J. Patel and Jaisukh A. Patel and as the next best friends of Deena J. Patel, individually; and Mr. & Mrs. Stan Moss, individually and as Temporary Administrators of the Estate of Alison Leslie Moss. Respondents are plaintiffs in the underlying litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the appellees and respondents in the Fifth Circuit appellate and mandamus proceeding.

The Honorable Samuel B. Kent, Judge of the United States District Court for the Southern District of Texas, Galveston Division, is the Judge before whom the underlying litigation is now pending and was also a respondent in the Fifth Circuit mandamus proceeding pursuant to Federal Rule of Appellate Procedure 21, although his name was not listed as a respondent in the caption in that proceeding pursuant to Fifth Circuit Local Rule 21. Judge Kent was represented pro forma in the Fifth Circuit mandamus proceeding by counsel for the parties opposing the mandamus, Laura Howell Linton et al., Respondents in this Court.

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AIRBUS INDUSTRIE, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Airbus Industrie and Aeroformation (the "Airbus Defendants") respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit dated August 16, 1994. The Fifth Circuit dismissed the Airbus Defendants' appeal and denied their alternative motion to recall the mandate and their petition for a writ of mandamus. The Airbus Defendants had sought review in the Fifth Circuit of the district court's denial of their immunity claim under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1988 & Supp. V 1993), but, because the district court had remanded the case to state court, the Fifth Circuit held that 28 U.S.C. § 1447(d) (1988 & Supp. V 1993) deprived it of jurisdiction to review this denial of immunity.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals dismissing the Airbus Defendants' appeal and denying their alternative motion to recall the mandate and their petition for a writ of mandamus is reported at 30 F.3d 592 (5th Cir. 1994), and is reprinted as Appendix A hereto.

The order of the United States District Court for the Southern District of Texas remanding the case to Texas state court is not reported and is reprinted as Appendix B hereto.

The order of the United States District Court for the Southern District of Texas modifying its order that remanded the case to state court is not reported and is reprinted as Appendix C hereto.

The order of the United States District Court for the Southern District of Texas denying the motion to remand the case to state court is not reported and is reprinted as Appendix D hereto.

The order of the United States District Court for the Southern District of Texas denying the Airbus Defendants' FSIA immunity is reported at 794 F. Supp. 650 (S.D. Tex. 1992), and is reprinted as Appendix E hereto.

The order of the United States District Court for the Southern District of Texas staying its order of remand is not reported and is reprinted as Appendix F hereto.

The order of the United States Court of Appeals for the Fifth Circuit denying the Airbus Defendants' Petition for Panel Rehearing and Suggestion for Rehearing En Banc is not reported and is reprinted as Appendix G hereto.

The judgment of the United States Court of Appeals dismissing the Airbus Defendants' appeal and denying their alternative motion to recall the mandate and their petition for writ of mandamus is not reported and is reprinted as Appendix H hereto.

The order of the United States Court of Appeals for the Fifth Circuit dismissing the Airbus Defendants' prior appeal in this case, Fifth Circuit Appeal No. 92-7564, is not reported and is reprinted as Appendix I hereto.

The order of the United States Court of Appeals for the Fifth Circuit denying the Airbus Defendants' Petition for Panel Rehearing in the prior appeal in this case, Fifth Circuit Appeal No. 92-7564, is not reported and is reprinted as Appendix J hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the August 16, 1994 decision of the United States Court of Appeals for the Fifth Circuit, which dismissed the Airbus Defendants' appeal and denied their alternative motion to recall the mandate and their petition for a writ of mandamus.

On August 30, 1994, Petitioners timely filed a Petition for Panel Rehearing pursuant to Federal Rule of Appellate Procedure 40 and a Suggestion for Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35 in the Fifth Circuit. The Fifth Circuit denied the Petition for Panel Rehearing and the Suggestion for Rehearing En Banc on September 13, 1994. Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1988):

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), (b) (1988):

> **§ 1603. Definitions**
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is

owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1441(d) (1988):

§ 1441. Actions removable generally

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury . . . .

28 U.S.C. § 1447(d) (1988):

§ 1447. Procedure after removal generally

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1291 (1988):

§ 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This case arises out of a crash near Bangalore, India of an Airbus A320 model aircraft, which was assembled by Petitioner Airbus in France and delivered to Indian Airlines in France. The aircraft was then operated by Indian Airlines using Indian crews most of whom had been trained in India by Indian Airlines and some of whom had been trained in France by Petitioner Aeroformation. The crash was investigated in India by Indian authorities.

Despite the complete lack of any connection with the State of Texas, the Plaintiffs instituted two separate actions in state district court in Brazoria County, Texas. Both actions were timely removed to the United States District Court for the Southern District of Texas and consolidated. Jurisdiction for removal was based on two independent grounds of federal court jurisdiction: (1) diversity

jurisdiction under 28 U.S.C. § 1332 because all the United States parties, Plaintiffs, and Defendants, were diverse, and the foreign parties were additional parties; and (2) federal question jurisdiction under the FSIA and 28 U.S.C. §§ 1441(d) and 1330(a) because the Airbus Defendants were agencies or instrumentalities of foreign states. After removal, the Plaintiffs filed motions to remand their respective actions to state court.

The Airbus Defendants filed motions to dismiss, arguing, among other things, that they were agencies or instrumentalities of foreign states as those terms are defined by the FSIA, and, accordingly, were entitled to absolute immunity from suit in the courts of the United States and of the States. Defendants also moved for dismissal on the grounds of *forum non conveniens* and lack of *in personam* jurisdiction.

On July 22, 1992, the district court entered an order (the "FSIA Order"), which held that the FSIA does not apply to the Airbus Defendants because they are not agencies or instrumentalities of foreign states. *Linton v. Airbus Industrie*, 794 F. Supp. 650, 653-54 (S.D. Tex. 1992); Appendix E at E-1 to E-8. The district court's ruling was based on its conclusion that, even assuming that the FSIA permits pooling of interest of several foreign countries to meet the requirement that the entity claiming immunity under the FSIA have "a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof," 28 U.S.C. § 1603(b)(2), the interest of one of the countries at issue—Germany—could not be pooled with the interests of other countries because Germany did not own a majority in the companies through which Germany held its ownership interest in the Airbus Defendants. Appendix E at E-4 to E-7. Absent inclusion of Germany's interest, neither Airbus Defendants had a majority of its

shares owned by a foreign state or states as required by the FSIA. Appendix E at E-4.

From the district court's FSIA Order, the Airbus Defendants timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. That appeal was docketed as No. 92-7564 in the Fifth Circuit.

On February 24, 1993, the Fifth Circuit dismissed the appeal in No. 92-7564, finding that the FSIA Order was not final and therefore not appealable under either 28 U.S.C. § 1291 or the collateral order doctrine. Appendix I at I-1 to I-2. Accordingly, the Fifth Circuit remanded the case to the district court with instructions to rule on Plaintiffs' motions to remand and Defendants' motions to dismiss. Appendix I at I-2.

After the Fifth Circuit dismissed the prior appeal for lack of appellate jurisdiction, the district court initially entered an order denying Plaintiffs' motions to remand and the motion for leave to file an amended complaint, which would have altered the citizenship allegations of the plaintiffs to destroy diversity jurisdiction. Appendix D at D-1 to D-10.

After some of the parties in the district court entered into a stipulation regarding the residency and travel patterns of certain plaintiffs and individuals whose estates they represented in order to clarify some of the background factual issues related to the *forum non conveniens* motion, the district court, *sua sponte*, readdressed Plaintiffs' motions to remand and concluded that (i) it lacked personal jurisdiction

over the Airbus Defendants[2/] and (ii) if it could exercise jurisdiction over the Defendants, it would dismiss the action for *forum non conveniens*. Appendix B at B-2. The district court also determined that it lacked subject matter jurisdiction because, although diversity jurisdiction properly existed at the time of removal, the postremoval stipulation divested the district court of diversity jurisdiction. Appendix B at B-7 to B-10. Accordingly, the district court entered an order that granted Plaintiffs' motions to remand for lack of subject matter jurisdiction on the ground that complete diversity did not exist between the parties because Plaintiff Laura Howell Linton, in her representative capacity, is a stateless United States citizen. Appendix B at B-10. In its remand order, the district court recognized the separable nature of its previous FSIA Order, which had denied the Airbus Defendants' claim of immunity from suit under the FSIA, and the court expressly contemplated appellate review of that order:

> As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA").

Appendix B at B-11 n.12.

Before any notice of remand was sent to the clerk of the state court, the district court entered an order staying its remand order pending appeal to the Fifth Circuit on the FSIA

[2/]The district court later entered an order vacating the portion of its remand order that addressed personal jurisdiction. Appendix C at C-1 to C-2. As the district court recognized, "the relevant parties had stipulated to the Court's personal jurisdiction." *Id.*

issue. Appendix F at F-1. The order staying the remand order expressly stated that the district court's purpose in staying its remand order was to facilitate immediate appellate review of "the Airbus Defendants' Foreign Sovereign Immunities Act appeal." *Id.* On July 14, 1993, the Airbus Defendants timely filed their notice of appeal to the Fifth Circuit.

The Fifth Circuit dismissed Defendants' appeal and denied their alternative motion to recall the mandate from the prior appeal and their alternative petition for writ of mandamus. Appendix A at A-2 to A-3, A-19. In dismissing, the Fifth Circuit concluded that the district court's FSIA Order was not a separable order under Fifth Circuit precedent that narrowly construes the separable order doctrine, and thus, that the prohibition in 28 U.S.C. § 1447(d) deprived the Fifth Circuit of jurisdiction to review the case by appeal, mandamus, or otherwise. Appendix A at A-8 to A-12. The Fifth Circuit's opinion did, however, state that "the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity," and criticize the legal conclusions on which the district court based its FSIA Order. *Id.* at A-12 & n.28.

The Fifth Circuit has stayed the issuance of its mandate for the purpose of preparing this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE SEPARABLE ORDER DOCTRINE, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, DEPRIVES FOREIGN SOVEREIGNS OF THE RIGHT TO SEEK REVIEW UNDER THE COLLATERAL ORDER DOCTRINE OF AN ERRONEOUS DENIAL OF IMMUNITY FROM SUIT UNDER THE FSIA WHEN THE DISTRICT REMANDS THE CASE TO STATE COURT.

Section 1447(d) states that, except for civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d) (1988). In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court made clear that the seemingly unequivocal language of section 1447(d) may give way to permit appellate consideration of certain categories of remand orders. Although this case does not fall within the exception that this Court carved out in *Thermtron*, this case does fall within the "separable order" doctrine, which is based on this Court's earlier decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).

City of Waco involved a Texas state court action that was removed to the federal court on diversity grounds by a third-party defendant. When the district court dismissed the third-party action, diversity jurisdiction was destroyed, and the case was remanded to state court. Holding that the dismissal of the third-party action was not immune from review, this Court wrote:

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Id. at 143.

The circuit courts of appeals have construed the *City of Waco*'s separable order doctrine in a variety of cases and have developed conflicting case law under this doctrine. The Fifth Circuit's holding that the district court's FSIA Order was not "separable" from the remand order and therefore not reviewable deprives foreign sovereigns of the right to seek review under the collateral order doctrine of an erroneous denial of immunity from suit under the FSIA when the district court remands the case to state court. This decision conflicts with the decisions of other circuits and should be reversed by this Court.

A. The Separable Order Doctrine in the Fifth Circuit

The Fifth Circuit's holding in this case was based on prior decisions in the circuit construing this Court's decision in *City of Waco*. The Fifth Circuit has construed the separable order doctrine to require that the separable order both precede the order "of remand 'in logic and in fact' and is 'conclusive,' *i.e.*, it will have the preclusive effect of being functionally unreviewable in state court." Appendix A at A-10 to A-11. Finding that "the district court's determination that the FSIA is inapplicable to the Airbus Defendants can be deemed a jurisdictional finding" that could

be reviewed by the state court on remand, the Fifth Circuit relied on its previous decision in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993). In *Mobil*, the Fifth Circuit addressed whether a district court's ruling that the Insurance Co. of Ireland was not a foreign sovereign was reviewable on appeal when the case had been remanded to state court. In that case, the party claiming to be a foreign sovereign was not claiming immunity from suit under the FSIA, only the right to a federal forum and a bench trial.[3/] The Fifth Circuit held in *Mobil* that the district court's determination that the Insurance Co. of Ireland was not a foreign sovereign was a jurisdictional call, rather than a substantive ruling, and was thus not reviewable a separable order. *Id.* at 666.

Based on its decision in *Mobil*, the Fifth Circuit reasoned in this case that because the Airbus Defendants could assert their immunity from suit under the FSIA in state court and because the FSIA Order would have no preclusive effect on the state court on the immunity issue, the FSIA Order was not "conclusive." Appendix A at A-11. Failing to address that the remand order conclusively determined the Airbus Defendants' right to a federal forum under the FSIA as well as the issue of removability itself and the issue of *forum non conveniens*,[4/] the Fifth Circuit held that the FSIA

[3/]The Insurance Co. of Ireland could not have claimed immunity from suit because the commercial activity exception to the FSIA applied. 28 U.S.C. § 1605(a)(2) (1988 & Supp. V 1993).

[4/]The defense of *forum non conveniens* is not available to the Airbus Defendants in Texas state court. *See Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). Although the Texas Legislature legislatively overruled *Alfaro*, Act of February 23, 1993, S.B. 2, § 1, 73d Leg., 1st R.S. (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051), the new statute does not apply to this case because it was filed before September 1, 1993.

Order was not separable and that section 1447(d) barred appellate review of that order. *Id.* at A-11.

B. The Separable Order Doctrine in Other Circuits

1. The Third Circuit

In the Third Circuit, the FSIA Order would have been reviewable. *See In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992); *Carr v. American Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994). In *TMI*, the basis of removal jurisdiction was the Price-Anderson Amendment Act of 1988, 42 U.S.C. § 2011 (1988), which created a federal cause of action for nuclear accident claims and specified that federal courts have original jurisdiction and that claims under the Act filed in state court are subject to removal. *TMI*, 940 F.2d at 835. The district court held that the Act itself was unconstitutional because Congress in purporting to create a federal forum through the Act exceeded the authority granted to it by Article III, section 2 of the United States Constitution. *TMI*, 940 F.2d at 835. Because the district court held that the Act that was the basis of removal jurisdiction was unconstitutional, the district court remanded the case for lack of subject matter jurisdiction. *Id.*

The district court stayed the remand order and certified the issue of the constitutionality of the Act for an interlocutory appeal under 28 U.S.C. § 1292(b). *TMI*, 940 F.2d at 836. On appeal, the Third Circuit addressed whether section 1447(d) deprived it of jurisdiction to review "any aspect of the remand order, including the constitutional determination on which it was based." *TMI*, 940 F.2d at 836. The Third Circuit held that section 1447(d) did not bar review of the appeal of the district court's constitutionality

ruling despite the fact that the finding of unconstitutionality defeated the district court's subject matter jurisdiction, resulting in the case being remanded to state court. *TMI*, 940 F.2d at 836, 842.

The Third Circuit found that the *Thermtron* exception did not apply because "the district court relied *specifically* on section 1447(c) in reaching the determination to remand [and] the district court's conclusions of constitutional law ultimately implicated subject matter jurisdiction." *TMI*, 940 F.2d at 843. While the district court's decision in *TMI* that the Act was unconstitutional was a substantive decision preceding the remand order, the heart of the district court's ruling was jurisdictional. *Id.* Unless the Act had been found to be constitutional, there could be no federal subject matter jurisdiction. *Id.*

Nevertheless, the Third Circuit concluded that section 1447(d) was not intended to prevent review of an underlying substantive decision on the constitutionality of a federal statute. *TMI*, 940 F.2d at 836, 843. Nor did Congress "in enacting section 1447(d) . . . intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes." *TMI*, 940 F.2d at 843. The Third Circuit observed that if section 1447(d) bars review of a remand order based on a finding that the statute authorizing removal was unconstitutional, "[e]ach district court would thus be free to reach its own conclusion regarding the constitutionality of statutes authorizing removal" and "inconsistent results would be completely insulated from review." *TMI*, 940 F.2d at 846.

The Third Circuit also found that the order of remand was "conclusive." *Id.* at 845. The *TMI* decision makes clear that the issue that is conclusively determined by the order of remand is the issue of removability itself: "Remand

orders which are unreviewable under section 1447(d) remain unreviewable even on appeal from the final judgment of a state court." *TMI*, 940 F.2d at 845. As this Court has observed: "[T]he issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568-69 (1941). In conflict with *TMI*, the Fifth Circuit's decision in this case ignored the fact that the remand order conclusively determined the Airbus Defendants' right to a federal forum under 28 U.S.C. § 1441(d) and the removability issue itself.[5/] *See* Appendix A at A-11. Instead, the Fifth Circuit focuses its analysis of the conclusiveness of the remand order on whether the Airbus Defendants can reurge their immunity claim in state court on remand. *Id.* As *TMI* makes clear, this is not the proper inquiry.

The Third Circuit's *TMI* decision squarely conflicts with the Fifth Circuit's decision in this case. Had the district court in this case found that the FSIA was unconstitutional as exceeding Congress' Article III power and remanded the case to state court finding that the unconstitutionality of the FSIA deprived the court of removal jurisdiction under the FSIA, the Fifth Circuit's analysis, in conflict with the Third Circuit's decision in *TMI*, would bar review of the unconstitutionality holding under section 1447(d). Under the Fifth Circuit's decision in this case, a finding that the FSIA is unconstitutional would be a jurisdictional call that would have no preclusive effect on the state court on remand and thus not be "conclusive." *See* Appendix A at A-11.

[5/] As explained *supra* note 4 and accompanying text, the remand order also conclusively determined the *forum non conveniens* issue since that defense cannot be asserted in the state court to which the case was remanded.

Accordingly, under the Fifth Circuit's analysis, section 1447(d) would bar any review of the constitutionality ruling.

Although the underlying substantive determination in this case does not involve the constitutionality of a statute, the same compelling policy reasons apply to the underlying substantive determination of the applicability of the FSIA. A determination that the FSIA does not apply to a foreign sovereign claiming FSIA immunity is no less important than a determination that a statute is unconstitutional.[6/] As this Court has recognized, Congress' intent in enacting the FSIA and in providing foreign sovereigns an absolute right to remove actions against them to federal court was clear: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Indeed, given that a denial of a claim of immunity from suit is immediately appealable under the collateral order doctrine and that a determination of unconstitutionality is not immediately appealable, this case presents a more compelling reason to allow review as a separable order than did *TMI*.

The FSIA Order also would have been reviewable under the Third Circuit's recent decision in *Carr v. American Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994). In *Carr*, the Third Circuit held that an order is separable from a remand order if the issue that is dispositive of both the remand order and the order sought to be reviewed "has independent relevance in adjudging the rights of the parties (*i.e.*, relevance beyond determining the existence of federal subject

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[6/]For a full discussion of the importance of the FSIA, *see infra* subpart I(C).

matter jurisdiction)." *Id.* at 675.[7] In *Carr*, the plaintiff brought in state court a tort suit arising from a transfusion of Human Immunodeficiency Virus-infected blood against the American Red Cross and another party. *Id.* at 673. The Red Cross removed the case based this Court's decision in *American National Red Cross v. S.G.*, 112 S. Ct. 2465 (1992), which held that the Red Cross charter confers federal jurisdiction over civil cases to which Red Cross is a party. *Carr*, 17 F.3d at 674. Based on a release that the plaintiff gave Red Cross, the plaintiff moved to dismiss Red Cross and to remand the case to state court. *Id.* The district court dismissed Red Cross and, declining to exercise any residual supplemental jurisdiction over the remaining claim against the other defendant, remanded the case to state court. *Id.*

The Third Circuit, under this Court's *City of Waco* decision, held that the order dismissing Red Cross was separable from the remand order and that 28 U.S.C. § 1447(d) therefore did not bar review of the case. *Carr*, 17 F.3d at 675. The court found that the order of dismissal "had independent relevance in adjudging the rights of all three parties involved in this action." *Id.* Because "the ramifications of the dismissal order impacted on more than the issue of federal subject matter jurisdiction alone," the order of dismissal was a separable order under *City of Waco*. *Carr*, 17 F.3d at 675. Once the court found that 1447(d) presented no bar to appellate review, the court, determining that the order dismissing Red Cross was appealable as a final order under the *Cohen* collateral order doctrine,[8] found that it had jurisdiction to review the order dismissing Red Cross. *Carr*, 17 F.3d at 675-76.

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[7] *Accord Allen v. Ferguson*, 791 F.2d 611, 614 (7th Cir. 1986).

[8] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The result would have been different in this case under the rule followed in the Third Circuit in *Carr*. In this case, the FSIA Order had "relevance beyond determining the existence of federal subject matter jurisdiction,"—it determined the Airbus Defendants' claim of immunity from suit under the FSIA. *Id.* That the FSIA Order "impacted on more than the issue of federal subject matter jurisdiction alone," *id.*, would have made the FSIA Order reviewable in the Third Circuit. And, under the second prong of the *Carr* analysis, because the FSIA Order denied the Airbus Defendants' immunity from suit, the FSIA Order was—or ultimately under the doctrine of merger became—a final, appealable decision under the collateral order doctrine.[2/] *See, e.g., Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) (denial of immunity from suit under the FSIA is an appealable decision under the collateral order doctrine); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 494 U.S. 937 (1989); *Compania Mexicana de Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Gould, Inc. v. Pechiney Ugine*

[2/]The Fifth Circuit's opinion asserts with no support from the record that the district court never ruled on the Airbus Defendants' motion to dismiss based on the claim of immunity from suit "because it concluded that it lacked subject matter jurisdiction." Appendix A at A-15 n.34. The Fifth Circuit's attempt to distinguish between the district court's jurisdictional determination under the FSIA and its determination of the Airbus Defendants' claim of immunity from suit under the FSIA is misguided. The district court's FSIA Order, which held that the Airbus Defendants were not foreign sovereigns under the FSIA, necessarily determined that the Airbus Defendants were not entitled to dismissal based on their claim of immunity from suit. Even if the district court did not make a ruling on the Airbus Defendants' motion to dismiss, the district court's finding that the "FSIA does not apply to [the Airbus Defendants]," Appendix E at E-7 to E-8, was dispositive of the motion to dismiss based on immunity and is a de facto denial of a claim of immunity from suit, which is itself appealable.

Kuhlmann, 853 F.2d 445, 450 (6th Cir. 1988); *Eckert Int'l, Inc. v. Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 173 (E.D. Va. 1993), *aff'd*, 32 F.3d 77 (4th Cir. 1994).

2. The Ninth Circuit

Under Ninth Circuit precedent, 28 U.S.C. § 1447(d) would not bar appellate review of the FSIA Order. In the Ninth Circuit, when a district court's remand order is based on the resolution of the merits of some matter of substantive law of the parties apart from the jurisdictional decision, section 1447(d) does not foreclose appellate review of that decision. *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

In *Clorox*, the remand order was based on the district court's belief that Clorox had waived its right to remove. *Clorox*, 779 F.2d at 520. Concluding that a determination of waiver of the right to remove was a substantive decision on the merits apart from any jurisdictional decision, the Ninth Circuit found that section 1447(d) did not bar review of the decision. *Id.*

In *Pelleport*, the Ninth Circuit concluded that it could review the remand order in a contract case where the district court had remanded the case based on its conclusion that a forum selection clause in the contract was valid and enforceable. *Pelleport*, 741 F.2d at 276-77. The Ninth Circuit concluded that it could review the remand order because the remand order was not based on jurisdictional grounds but instead was based on a substantive determination affecting the rights of the parties. *Id.* at 277.

The result in this case also would have been different in the Ninth Circuit.[10/] In this case, the district court's remand order necessarily was based on the district court's decision that the Airbus Defendants were not agencies or instrumentalities of foreign sovereigns under the FSIA, which the district court had earlier resolved in its FSIA Order. Whether the FSIA applied to the Airbus Defendants was a matter of substantive FSIA law on the pooling of foreign interests and tiered ownership, which question determined the Airbus Defendants' claim of immunity from suit. This claim of immunity from suit was separable and "apart from any jurisdictional decision." *Pelleport*, 741 F.2d at 276.

3. The Sixth Circuit

Under Sixth Circuit precedent, section 1447(d) would not bar review of the FSIA Order. *See Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). In *Regis*, the plaintiff sought to remand the case based on a forum selection clause. *Id.* Following the Ninth Circuit's decision in *Pelleport*, the Sixth Circuit stated a more liberal test for the separable order doctrine than *Pelleport*:

[10/] The Ninth Circuit's approach, referred to by one court as the "matter of substantive law" exception, has been criticized by the Fifth and Eleventh Circuits, which construe exceptions to section 1447(d) more narrowly. *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1987).

Other circuits have followed the *Pelleport/Clorox* exception. *E.g.*, *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991); *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988).

> [A] remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction.

Id. This approach brings the Sixth Circuit in line with the Third Circuit's decision in *Carr*.

Under the Sixth Circuit's test, the remand order in this case was "based on a substantive decision on the merits of a collateral issue"—whether the Airbus Defendants were foreign sovereigns under the FSIA and thus entitled to immunity from suit—"as opposed to just matters of jurisdiction." *Regis*, 894 F.2d at 194.

C. The Fifth Circuit's Improper Application of Section 1447(d) to Bar Review of a Denial of a Claim of Immunity from Suit Under the FSIA Defeats the Policy of the FSIA.

As this Court has recognized, the FSIA was designed "'[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (quoting H.R. REP. No. 1487, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631). To implement fully this policy behind the FSIA, the statute must be uniformly applied "since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. REP. No. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611. Uniformity in the development of FSIA law is "best served by trying all FSIA cases in federal court unless the parties unequivocally choose otherwise." *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1212 (5th

Cir. 1991); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 894 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990).

In *Verlinden*, this Court recognized that in enacting the FSIA, Congress intended to circumvent the possibility of interference with foreign relations presented by the lack of uniformity and local bias in civil case law:

> Congress, pursuant to its unquestioned Art. I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states.

Verlinden, 461 U.S. at 497.

The two instances in which the bar to review in section 1447(d) and erroneous denials of FSIA status have clashed have already produced precisely the results that the Congress sought to avoid. It is now the law that the Insurance Company of Ireland ("ICI"), the party claiming to be an agency or instrumentality of a foreign state in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993), is *at the same time* a foreign state in the Third Circuit and entitled to a federal forum, but it is not a foreign state in the Southern District of Texas in the Fifth Circuit. *Compare In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n.8 (3d Cir. 1994) (ICI is an agency or instrumentality of a foreign state under the FSIA), *cert. denied*, 63 U.S.L.W. 3009 (U.S. Oct. 3, 1994) (No. 93-2070) *with Mobil Corp.*, 984 F.2d at 666 (holding that order remanding action based

on finding that ICI was not an agency or instrumentality of a foreign state under the FSIA is unreviewable).

As to Petitioner Airbus, the Fifth Circuit's refusal to review FSIA determinations in the present context has produced even more bizarre results. Within the Southern District of Texas, Airbus is an agency or instrumentality of a foreign state in Houston. *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994) (Black, C.J.) (denying a motion to remand, "the Court finds that [Airbus] is a sovereign entity"). Forty miles away, in Galveston, Airbus is not an agency or instrumentality of a foreign state. Appendix E at E-7 to E-8 ("FSIA does not apply to Airbus Industrie").

Congress explicitly mandated that foreign states receive federal forums for claims against them in order to promote uniform results and avoid the bias inherent in state courts. Interpreting section 1447(d) as prohibiting review of even erroneous determinations of FSIA status defeats the very goal Congress mandated.

The Fifth Circuit's decision also deprives foreign sovereigns of the right to seek review under the collateral order doctrine of an erroneous denial of immunity from suit under the FSIA. Such a deprivation can result any time that a plaintiff institutes an action in state court against a party that claims to be a foreign sovereign. The foreign sovereign has the right to remove the case to federal court under 28 U.S.C. § 1441(d). A foreign sovereign claiming immunity from suit under the FSIA will move to dismiss the suit, and the plaintiff will file a motion to remand. The resolution of both the motion to dismiss and the motion to remand will simultaneously be controlled by the same determination—the applicability of the FSIA. Under the Fifth Circuit's decision in this case and under Fifth Circuit precedent, a district

court's denial of a claim of immunity from suit will never be reviewable when there is remand order.

This disastrous result of the Fifth Circuit's decision can be averted only if this Court exercises its certiorari jurisdiction to resolve the conflict among the circuits on the proper application of the separable order doctrine and to decide the important question of whether a denial of immunity from suit under the FSIA is reviewable as a separable order even when the case has been remanded to state court.

D. The District Court's Underlying Denial of Immunity from Suit Under the FSIA Was Erroneous.

The ruling that the Airbus Defendants have vigorously sought to have reviewed is the district court's FSIA Order. In the FSIA Order, the district court held that the FSIA did not apply to the Airbus Defendants because the Airbus Defendants were not agencies or instrumentalities of foreign states for purposes of the FSIA. Appendix E at E-7 to E-8. Although the Fifth Circuit found that it had no jurisdiction to review the FSIA Order, the Fifth Circuit expressly stated its disagreement with the district court's FSIA Order. Appendix A at A-11 to A-12 n.26

The FSIA provides immunity to foreign states from the jurisdiction of Courts of the United States and of the States. 28 U.S.C. § 1604 (1988). Section 1603 of the FSIA defines a foreign state to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." *Id.* § 1603(a). Subsection (b) of section 1603 defines an agency or

instrumentality of a foreign state as an entity the majority of whose ownership interest is held by a foreign state. 28 U.S.C. § 1603(b).

At all relevant times herein, over fifty percent of the ownership interests of both Airbus Defendants was held by the governments of France, Germany, and Spain. These governments' interest in Airbus were held through four intermediary entities, although no one intermediary entity held a majority of Airbus by itself. The FSIA permits interests held by several foreign sovereigns to be pooled in determining whether the foreign states together own the requisite majority interest in the entity seeking FSIA protection.[11/] *See, e.g., Le Donne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1405-06 (E.D. Va. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see also* Appendix A at A-12 to A-13 n.28 (citing with approval cases permitting pooling).

The district court held that the interests in Airbus held by one of the intermediary entities, Deutsche Airbus GmbH, must be ignored in calculating the total ownership held by foreign states because Deutsche Airbus GmbH itself did not also qualify as a foreign state under the FSIA. Appendix E at E-4 to E-8. The Fifth Circuit, although it found that it had no jurisdiction to consider the issue, criticized the district court's holding:

[11/] In fact, Chief Judge Norman Black in *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994), expressly accepted the doctrine of pooling in his finding that the Airbus Defendants were foreign sovereigns under the FSIA.

> The controlling statute, however, erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity*—not its parent—have 'a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof.' There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Appendix A at A-12 to A-13 n.28.

Unless this Court exercises its certiorari jurisdiction and reverses the decision of the Fifth Circuit, the Airbus Defendants will have lost their right to seek review of the district court's erroneous denial of their immunity from suit under the FSIA.

CONCLUSION

The Fifth Circuit's decision in this case, unless reversed, will expand section 1447(d)'s prohibition against review of cases that have been remanded, defeat uniform development of the body of law under the FSIA, and disturb the relations of the United States and foreign sovereigns. The same exigencies of judicial administration that led this Court in the *City of Waco* to recognize the availability of review when there is a substantive decision that has relevance beyond determining the existence of subject matter jurisdiction justify this Court's exercise of its certiorari jurisdiction to reverse the decision of the Fifth Circuit in this case and to establish that an order denying FSIA immunity is separable from an order of remand based on a finding that

there is no federal subject matter jurisdiction under the FSIA, and therefore reviewable.

The Fifth Circuit's decision in this case should be reversed because it authorizes appellate courts to ignore erroneous district court decisions that deny foreign sovereigns' claims of immunity from suit under the FSIA when there is a remand order, gives district courts unfettered discretion in denying foreign sovereigns' legitimate claims of immunity from suit under the FSIA when the FSIA was also the basis of removal, will deprive foreign sovereigns of their right to a federal forum, and will defeat uniform application of the FSIA contrary to the express intention of Congress. Those serious consequences, it is submitted, are compelling reasons for this Court to exercise its certiorari jurisdiction.

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